

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 MUR 6158) CASE CLOSURE UNDER THE
 ABC, Inc., Harpo, Inc. and) ENFORCEMENT PRIORITY SYSTEM
 Harpo Productions, Inc.)

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, matters that are low-rated

are forwarded to the Commission with a recommendation for dismissal. Furthermore, the Commission has directed that matters which clearly fall within the media exemption pursuant to 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73 and 100.132 should be immediately recommended by this Office for dismissal as an exercise of the Commission's prosecutorial discretion.¹

In this case, the complainant, William Stotts, alleges that ABC, Inc., Harpo, Inc., and Harpo Productions, Inc., provided either excessive or prohibited in-kind contributions to Obama for America by having the candidate Barack Obama appear on the Oprah Winfrey Show during the primary season. According to the complainant, the value afforded to the Obama for America campaign committee for the appearance totaled \$120,000.

The Federal Election Act of 1971, as amended (the "Act"), prohibits corporations from making contributions or expenditures from their general treasury funds "in connection with" the election of any candidate for Federal office. 2 U.S.C. § 441b(a). The Act defines "contribution" and "expenditure" to include "anything of value" made for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8) and (9). The term "anything

¹ The potential respondents in this matter have not been notified in order that the Commission be afforded the opportunity to quickly dismiss the case. See 2 U.S.C. § 437g(a).

of value" includes in-kind contributions. 11 C.F.R. § 100.52(d)(1). Contributions and expenditures must be disclosed under the Act. 2 U.S.C. §§ 432 and 434. The Act's media exemption excludes from the definitions of contribution and expenditure "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station...unless the facility is owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73 and 100.132.

In order for an entity to fall within the media exemption the Commission has looked to a two-part test. First, the Commission asks whether the entity engaging in the activity is a media entity within the meaning of the Act and the Commission's regulations. *See* Advisory Opinion 2005-16 (Fired Up). Second, the Commission, in determining the exemption's scope, asks (a) whether the media entity is owned or controlled by a political party, committee, or candidate; and, if not, (b) whether the entity was functioning within the scope of a legitimate media entity at the time of the alleged violation. If the media entity is independent of any political party, committee, or candidate, and if it was acting as a legitimate media entity at the time of the alleged violation, it is exempt from the Act's restrictions on corporate contributions and expenditures. *See id.*; *see also Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); and *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981).

The Oprah Winfrey show appears to provide news, commentaries, and editorial segments on a regular basis and, therefore, engages in activities traditionally associated with media entities. Additionally, it appears that Oprah Winfrey was not a candidate, nor did she organize a political committee. Moreover, the Oprah Winfrey Show is not owned or controlled by a political party or candidate. Furthermore, it does not appear that any of the

1 facilities (ABC Inc., the network that airs her program nationwide via syndication) that
2 broadcast the Oprah Winfrey Show are owned or controlled by any political party or
3 candidate. Also, there is no suggestion in the complaint that at the time of the show's airing
4 it was not acting as a legitimate media entity.² Thus, it appears that the respondents fall
5 within the media exemption for their activities.

6 Accordingly, due to the lack of specificity as to the nature of the alleged violations by
7 the respondents and the fact that the respondents appear to fall within the media exemption,
8 and in furtherance of the Commission's priorities and resources, relative to other matters
9 pending on the Enforcement docket, the Office of General Counsel believes that the
10 Commission should exercise its prosecutorial discretion and dismiss this matter. *See Heckler*
11 *v. Chaney*, 470 U.S. 821 (1985).

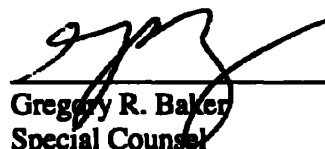
12 **RECOMMENDATION**

13 The Office of General Counsel recommends that the Commission dismiss
14 MUR 6158, close the file, and approve the appropriate letters.

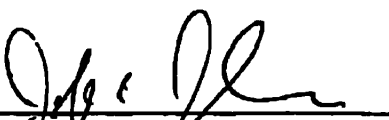
15 Thomasenia P. Duncan
16 General Counsel
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19 1/16/09
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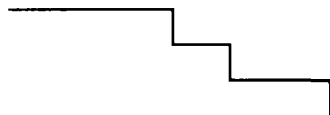

21 Gregory R. Baker
22 Special Counsel
23 Complaints Examination
& Legal Administration

² It should be noted that according to certain press accounts, Barack Obama had only been on the Oprah Winfrey Show twice prior to his election. Both appearances on the show, January 2005 and October 2006, preceded his Statement of Candidacy, dated February 12, 2007.



Jeff S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration

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